UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
v.	:	No. 2:04-CR-135
DAVID S. CHASE, MD, Defendant.	:	

OPINION AND ORDER

The Defendant, David S. Chase, MD, is charged with health care fraud and making false statements in connection with cataract surgery that he recommended and performed. At the close of the government's case in chief, Dr. Chase moved for a judgment of acquittal on all counts. For the reasons below, the motion is GRANTED in part and DENIED in part.

I. BACKGROUND

A. The Indictment

Dr. Chase is an ophthalmologist who practiced until recently in Burlington, Vermont. He is charged with 71 counts[1] of false statements and health care fraud in violation of 18 U.S.C. §§

[1] The Indictment, filed on September 16, 2004, charged Dr. Chase with 80 substantive counts as well as one forfeiture count (alleging that certain real property is subject to forfeiture if Dr. Chase is convicted on any of the other counts). On September 6, 2005, before the beginning of trial, the government dismissed nine counts, leaving 71 counts plus the forfeiture count. The government filed a redacted version of the Indictment omitting the dismissed counts. In this opinion, all citations to counts and paragraphs of the Indictment refer to the redacted version.

1035 and 1347. The Indictment alleges that Dr. Chase engaged in a scheme to obtain reimbursement from health care benefit programs ("benefit programs") for performing cataract surgery that was not medically necessary. It alleges that he recommended, and in some cases performed, cataract surgery for patients who did not actually need surgery. It alleges that he recorded false diagnoses, test results, and statements in the patients' medical charts, and that he intentionally destroyed or misfiled certain other records, in order to create the impression that surgery was medically necessary. It alleges that in the cases where surgery was actually performed, Dr. Chase submitted insurance reimbursement claims that falsely certified that the procedures were medically necessary.

The 71 substantive counts are based on Dr. Chase's treatment of 32 former patients. The Indictment alleges that Dr. Chase recorded false statements and recommended medically unnecessary cataract surgery in connection with all 32 patients. It states that he actually performed cataract surgery on nine of those patients (the "surgical patients"), while the other 23 patients (the "non-surgical patients") did not undergo surgery. The counts relating to the surgical patients are 1-13, 18-20, 23-29 (the "surgical counts"), and 70-71, while the counts relating to the non-surgical patients are 14-17, 21-22, and 30-69 (the "non-surgical counts").

B. The government's evidence

During its case in chief, the government introduced numerous documents into evidence and called more than 60 witnesses. The 32 patients identified in the Indictment testified regarding the history of their vision complaints and their interactions with Dr. Chase. Eight of Dr. Chase's former employees testified about various aspects of his practice. The government called 12 ophthalmologists and two optometrists to testify regarding their examinations of Dr. Chase's patients, as well as the standards for determining the medical necessity of cataract surgery. The government also called law enforcement and other witnesses who presented evidence about Dr. Chase's billing and surgery practices. In the following sections, the Court will describe specific pieces of evidence where they are relevant to Dr. Chase's arguments.

II. LEGAL STANDARD

Fed. R. Crim. P. 29(a) provides that on the defendant's motion, the Court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." The issue is whether "no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." United States v. Jackson, 335 F.3d 170, 180 (2d Cir. 2003). In making its determination, the Court must view the evidence in the light most favorable to the government, and draw all reasonable

inferences in its favor. Id.

Fed. R. Crim. P. 29(b) provides that the court is permitted, but not required, to reserve decision on a motion for judgment of acquittal. In such a case, the court may "submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict." Fed. R. Crim. P. 29(b). The rationale behind this provision is to "permit[] the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in proceeding to a verdict thereby preserving its right to appeal[.]" Fed. R. Crim. P. 29 Advisory C'ttee Note to 1994 Amendments.

III. DISCUSSION

At the close of the government's case in chief, Dr. Chase moved for a judgment of acquittal on all counts. In his motion, Dr. Chase argues that all of the non-surgical counts must be dismissed for lack of evidence that his allegedly false statements were material, and that the non-surgical Section 1347 counts must be dismissed for lack of evidence that his conduct qualifies as an attempt to execute a fraudulent scheme. He argues that various counts must be dismissed for lack of evidence of the standards that benefit programs use to determine medical necessity. He argues that certain allegations regarding specific

types of false statements must be struck for lack of evidence that benefit programs take those types of statements into account. He argues that certain allegations regarding false statements must be struck because the statements are not misleading in context. He argues that the surgical counts must be dismissed for lack of expert testimony that the surgeries were not medically necessary. Finally, he argues that several individual counts or allegations must be dismissed for lack of evidence.

A. The governing law

1. The charged offenses: 18 U.S.C. §§ 1035 and 1347

Dr. Chase is charged with violating 18 U.S.C. §§ 1035 and 1347, which were enacted as part of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) ("HIPAA"). Acting out of a concern that "health care fraud drains billions of dollars from public and private payers annually," Congress enacted Sections 1035 and 1347 in order to make "any fraud perpetrated against a public or private payer a federal criminal offense." United States v. Lucien, 347 F.3d 45, 48 (2d Cir. 2003).

The false statement counts of the Indictment charge violations of Section 1035, which provides:

> (a) Whoever, in any matter involving a health care benefit program, knowingly and willfully--
>
> (1) falsifies, conceals, or covers up by any trick,

> scheme, or device a material fact; or
> (2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.
>
> (b) As used in this section, the term "health care benefit program" has the meaning given such term in section 24(b) of this title.

18 U.S.C. § 1035. The health care fraud counts charge violations of Section 1347, which provides:

> Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud any health care benefit program; or
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,
>
> in connection with the delivery of or payment for health care benefits, items, or services, [commits a crime].

18 U.S.C. § 1347. The term "health care benefit program," as used in both Sections 1035 and 1347, is defined as

> any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

18 U.S.C. § 24(b).

Because HIPAA was enacted recently, there are relatively few cases interpreting Sections 1035 and 1347. Recognizing this "paucity of case law," United States v. Hickman, 331 F.3d 439,

445 (5th Cir. 2003), courts have often looked to cases interpreting the bank fraud statute, 18 U.S.C. § 1344,[2] for guidance in interpreting Section 1347. See id. (noting that Section 1347's "language and structure are almost identical to the bank fraud statute"); United States v. Cooper, 283 F. Supp. 2d 1215, 1231 (D. Kan. 2003) (noting that the "health care fraud statute was modeled after the bank fraud statute"). Similarly, because the language of Section 1035 closely tracks the language of the general false statements statute, 18 U.S.C. § 1001,[3] cases

---

[2] Section 1344 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud a financial institution; or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

[3] Section 1001 provides:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

interpreting that statute provide a useful basis for interpreting Section 1035.

2. Materiality under Sections 1035 and 1347

Several of Dr. Chase's arguments rely on the element of materiality. In general, to obtain a conviction for fraud or false statements, the government must prove the defendant engaged in a falsehood with regard to a "material" matter. A matter is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." Neder v. United States, 527 U.S. 1, 16 (1999); United States v. Gaudin, 515 U.S. 506, 509 (1995). As an element of the crime, materiality must be found by a jury beyond a reasonable doubt. Gaudin, 515 U.S. 506, 522-23.

Section 1035 expressly requires the government to prove that the defendant's falsehoods were material. With regard to Section 1347, although there is no explicit mention of materiality in the statute, it is well established that the closely related mail fraud, wire fraud, and bank fraud statutes contain implied requirements of materiality. Neder, 527 U.S. at 25 (interpreting 18 U.S.C. §§ 1341, 1343, and 1344). Noting that materiality is an element of the common-law definition of fraud, the Neder Court held that "we must presume that Congress intended to incorporate

---

[commits a crime].

materiality unless the statute otherwise dictates." Id. at 23. Recognizing that the reasoning of the Court in Neder applies with equal force to Section 1347, courts have uniformly held that materiality is an element of health care fraud under that statute. See, e.g., United States v. Cooper, 283 F. Supp. 2d 1215, 1232 (D. Kan. 2003) (requiring the government to demonstrate that the defendant engaged in "material, fraudulent representations"); United States v. Lauersen, No. 98 Cr. 1134, 1999 U.S. Dist. LEXIS 12868, *12 (S.D.N.Y. Aug. 20, 1999) (noting that "materiality. . . presumably is an element under the health care fraud statute as well since it shares common language [with the mail fraud statute]"); United States v. Gossman, 135 Fed. Appx. 32, 35 (9th Cir. 2005) (proceeding under the assumption that materiality is an element of Section 1347).

In accordance with the above case law, this Court holds that to obtain a conviction on the Section 1347 counts, the government must prove that the defendant made or caused to be made one or more materially false statements as alleged in that count. Given the express materiality requirement of Section 1035, this means that the government must prove materiality for every count in the Indictment.

B. Sufficiency of the evidence with regard to the non-surgical counts

Dr. Chase raises two arguments relating to the non-surgical counts. First, he argues that he is entitled to a judgment of acquittal on all of the non-surgical counts because the government has failed to establish the element of materiality with respect to those counts. Second, he argues that he is entitled to a judgment of acquittal on the non-surgical counts charging violations of Section 1347 because his conduct falls short of what the law requires for an execution or attempted execution of a fraudulent scheme.

1. Whether the government has established the materiality of the statements alleged in the non-surgical counts

Dr. Chase argues that he is entitled to a judgment of acquittal on both the Section 1035 and 1347 non-surgical counts because the government has failed to establish the materiality of the recordings he made in the non-surgical patients' charts. Because he never performed surgery or sought reimbursement on behalf of the non-surgical patients, Dr. Chase argues, those patients' charts never became available for review by benefit programs. Accordingly, he contends, the statements in the charts cannot be considered material because they were never capable of influencing any decision made by a benefit program.

The government has offered no evidence that any benefit program reviews a patient's charts or makes decisions regarding

the notations therein unless and until a claim for reimbursement has been made on behalf of that patient. Dr. Rosenberg testified that Medicare sometimes conducts reviews of patient records *after* payment has been made, but he stated that it does not look into records of patients on whose behalf no bill has been submitted. The available evidence also indicates that insurance company audits are extraordinarily rare; there is no evidence that Dr. Chase or any of the other doctors who testified had ever been audited. What is more, there has been no showing that an audit would cover records unconnected with a reimbursement claim.

While not contesting this state of the evidence, the government submits three responses to Dr. Chase's materiality argument. First, it argues, under both Sections 1035 and 1347, charts need not actually be submitted to or considered by a benefit program for their contents to be material to that program. It is sufficient, the government suggests, that at the time the statements were placed in the charts, there was a possibility that they might later influence a benefit program's decisionmaking process. Second, with respect to the Section 1035 counts, the government argues that the charts are material because they are capable of influencing decisionmakers other than benefit programs, such as health care providers. Third, with respect to the Section 1347 counts, it argues that Section 1347 does not require that the government demonstrate materiality with

respect to individual patient charts; it need only demonstrate that material false statements were made as part of the overall scheme.

a. Whether the charts are material to benefit programs that never had an opportunity to review them

The government's first argument is that the recordings in the non-surgical patients' charts must be considered material because at the time they were made, there was a theoretical possibility that a benefit program might one day become authorized to review them, even though that never actually transpired. The government invites the Court to overlook the fact that the charts were never made available to any benefit program because Dr. Chase never took any action, such as submitting a bill, that would have given the programs authority to review the charts.

The government's sweeping conception of materiality is at odds with the Supreme Court's definition of a material statement as one with "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body *to which it was addressed*." Neder, 527 U.S. at 16 (emphasis added). If a statement merely exists in isolation in a patient's medical chart, never subject to audit or review by a benefit program, it cannot reasonably be described as having been "addressed," or even capable of being addressed, to that program.

The government relies principally on the proposition that

proof of actual reliance by the decisionmaker is not necessary to establish materiality: "False statements may be material even though they do not mislead anyone, so long as they have the potential to influence the [decisionmaker's] conduct." United States v. Kwiat, 817 F.2d 440, 445 (7th Cir. 1987); accord United States v. Shapiro, 29 Fed. Appx. 33, 35 (2d Cir. 2002). This well-established proposition is insufficient to sustain the government's argument, however. To be sure, a statement may still be material if the decisionmaker disregards it or knows it is false. United States v. Rogers, 118 F.3d 466, 472 (6th Cir. 1997). Similarly, a statement can be material even if it was never physically submitted, as long as the statement was subject to audit or review by the decisionmaker. United States v. Rutgard, 116 F.3d 1270, 1287 (9th Cir. 1997); United States v. Candella, 487 F.2d 1223, 1227 (2d Cir. 1973). The government, however, would stretch the definition of materiality well beyond the existing case law by asserting that a statement is material even when the likelihood is minimal that the decisionmaker will view it or take it into consideration.

The government's position is not aided by language in some decisions stating that "[t]he materiality of a misstatement depends on the effect that is reasonably anticipated at the time the statement is made, not on how things turn out." Kwiat, 817 F.2d at 445. In contrast to the present case, the false

statement at issue in Kwiat had actually been submitted to the relevant decisionmaker, and it is evident that the court's language refers to the time at which the statement was made *to the decisionmaker*, not the time at which it was physically written down. The government's interpretation would be illogical; because materiality depends on context, a statement's materiality cannot be determined until the writer has actually taken the necessary steps to address it to a particular decisionmaker.

Perhaps the most striking fact supporting Dr. Chase's position is that the government has failed to cite a single case involving a prosecution for fraud or false statements in which a court found falsehoods to be material even though they were never made available to the relevant decisionmaker. In the majority of the cases cited by the government, the statement in question had actually been submitted to the decisionmaker. See United States v. White, 270 F.3d 356, 360-61 (6th Cir. 2001); United States v. Service Deli, Inc., 151 F.3d 938, 940-41 (9th Cir. 1998); United States v. Gafyczk, 847 F.2d 685, 691 (11th Cir. 1988); Kwiat, 817 F.2d at 444-45; United States v. Goldfine, 538 F.2d 815, 820 (9th Cir. 1976); United States v. Cisneros, 26 F. Supp. 2d 24, 40 (D.D.C. 1998) United States v. Pereira, 463 F. Supp. 481, 483 (E.D.N.Y. 1978). In the few remaining cases, the statements were not actually submitted to a decisionmaker, but had been entered

in files that were subject to review by the decisionmaker. See Rutgard, 116 F.3d at 1287 (medical charts were available for review subsequent to defendant's billing of Medicare); United States v. Hooper, 596 F.2d 219, 223 (9th Cir. 1979) (internal university records were available to government agency under its audit and inspection authority); Candella, 487 F.2d at 1227 (law mandated that the files "must be kept available by the City for audit and inspection by" federal agency). However, the government has not pointed to a single case, and the Court is unaware of any, that holds that statements can be considered material *before* they are made available for review by the decisionmaker.

Case law interpreting the related "jurisdiction" requirement of Section 1001 provides additional support for the notion that a false statement is only punishable once it becomes available for the decisionmaker's review. In Rutgard, which like this case involved an alleged scheme of fraudulent billing for cataract surgery, the court made clear that false statements in a doctor's files only become illegal under Section 1001 once payment is made by the benefit program and the files become subject to review: "It is argued that doctors should not be made criminals for inaccurate note taking. But the statute speaks to fraudulent notations. *They are criminal only when, as here, they prevent review of payments made to a physician by the government*."

Rutgard, 116 F.3d at 1287 (emphasis added). Similarly, in United States v. Lutz, 154 F.3d 581, 586-87 (6th Cir. 1998), the court held that the defendant's false statements on a loan application did not violate Section 1001 at the time that she wrote them or at the time she submitted the application to the lending institution, but they did once the application was submitted to the government.

The principle at issue in Lutz and Rutgard was not materiality, but rather the requirement in Section 1001 that a statement involve a "matter within the jurisdiction of the . . . Government." 18 U.S.C. § 1001(a). The corresponding provision in Section 1035 provides that the statement must be made in a "matter involving a health care benefit program." Just as a statement does not fall within the jurisdiction of the government until it becomes available for agency review, a statement cannot be considered to involve a benefit program, and hence it cannot violate Section 1035, until it becomes available for review by that benefit program's decisionmaking process.

For these reasons, the Court cannot accept the government's contention that statements in the non-surgical patients' charts were material to the decisionmaking process of the health care benefit programs that were allegedly victimized by Dr. Chase's scheme. Regardless of whether he made false statements in patient charts, those statements were not material under Sections

1035 or 1347 unless and until Dr. Chase took action that would make the charts available for review by a relevant decisionmaker, and there is no evidence that he took any such action with respect to the charts of the non-surgical patients.

b. Whether the charts are material under Section 1035 to entities other than benefit programs

The government also argues that in determining the materiality of the false statements alleged in the Section 1035 counts, the Court must take into account not only benefit programs, but also other potential decisionmakers in the health care system. It argues that Dr. Chase's statements had the potential to influence decisionmakers within Dr. Chase's own practice, such as the members of his internal peer review committee, outside accreditation organizations, or other doctors who might review the charts in question. For this reason, the government argues, the statements are material regardless of whether they were capable of influencing any other benefit programs.

Noting that the government's argument represents a different theory of materiality from what is described in the Indictment, Dr. Chase responds that the government has engaged in an impermissible constructive amendment of the Indictment. The Fifth Amendment requires that an indictment "give[] notice of the core of criminality to be proven at trial." United States v. Danielson, 199 F.3d 666, 669 (2d Cir. 1999). "When the trial

evidence or the jury charge operates to broaden the possible bases for conviction from that which appeared in the indictment, the indictment has been constructively amended." United States v. Milstein, 401 F.3d 53, 65 (2d Cir. 2005). "To prevail on a constructive amendment claim, a defendant must demonstrate that . . . the proof at trial . . . so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." United States v. Salmonese, 352 F.3d 608, 620 (2d Cir. 2003). Constructive amendment is a per se violation of a defendant's Fifth Amendment rights. Milstein, 401 F.3d at 65.

Since materiality is an essential element of the offenses charged in the Indictment, the constructive amendment doctrine precludes the government from relying upon evidence of materiality that was not alleged in the Indictment. Yet there is nothing in the Indictment to put Dr. Chase on notice that the government intended to charge him for making statements that were directed to or considered by any entity other than a benefit program. On the contrary, the entire thrust of the Indictment is based on the theory that Dr. Chase engaged in a scheme to make false statements that would mislead benefit programs in order to obtain money from those benefit programs. See, e.g., Indictment ¶ 15 "alleging that Dr. Chase "submitted and caused to be

submitted claims for reimbursement of medical services . . . to federally funded health care benefit programs, [listing examples], and private health care benefit programs, [listing examples]"); id. ¶ 21 (alleging that Dr. Chase engaged in a scheme "to defraud health care benefit programs and to obtain money and property owned by and under the custody and control of health care benefit programs"); id. ¶ 29 (alleging that Dr. Chase submitted "claims to health care benfit programs for reimbursement of medical services . . . that were not medically necessary"); id. ¶ 48 (alleging that Dr. Chase "regularly submitted claims to health care benefit programs using these fraudulent test results to justify secondary cataract surgery"). The Indictment is devoid of any indication that the alleged false statements were directed to or considered by other entities, such as other doctors or individuals in Dr. Chase's practice. It is too late for the government to propose, at this stage of the case, that the Court rewrite the Indictment to allow the jury to consider the impact of the statements on other individuals who are not mentioned in the Indictment.

The situation presented in this case is similar to that in Stirone v. United States, 361 U.S. 212 (1960), which involved a prosecution under the Hobbs Act. The indictment in Stirone had charged that interstate commerce was affected because a concrete manufacturer had imported sand from out of state. At trial,

however, the trial court instructed the jury that it could rely instead on evidence that the concrete had been used to build a steel mill that produced articles for use in interstate commerce. The Supreme Court held that constructive amendment had occurred. Stirone, 361 U.S. at 218-19. In this case, while the essential element is materiality rather than interstate commerce, the government likewise seeks to rely on a different theory and on different evidence than what is charged in the Indictment. The evidence the government now seeks to use is outside of the "core of criminality," Danielson, 199 F.3d at 669, of which Dr. Chase received notice in the Indictment.

The Court expresses no opinion as to whether, as a general matter, materiality under Sections 1035 and 1347 may be established by considering individuals that are not victims of the alleged fraud. The government's attempt to turn to such a theory at this stage of the case, however, represents an impermissible constructive amendment of the Indictment, and it cannot establish materiality for the non-surgical counts on this ground.

c. Whether Section 1347 requires materiality to be established for each patient chart

The government also argues that the materiality requirement of Section 1347 can be satisfied without a showing that every patient chart contains materially false statements. While conceding that Section 1347 incorporates a materiality

requirement, the government argues that the requirement applies only to the first element of the offense, which is the existence of a scheme to defraud, and not to the second element, which is the attempted or actual execution of the scheme. Accordingly, the government argues, once it has established the existence of an overall scheme based on materially false statements, it need not prove the materiality of every statement that represents an attempt to execute the scheme.

The government's attempt to confine the materiality requirement to the first element of the offense is unsupported by the law. It is true, as the government points out, that in the customary jury instructions for the offense of bank fraud under 18 U.S.C. § 1344, the word "materially" only appears in the first element. The three elements are:

> First, that there was a scheme to defraud a bank (or a scheme to obtain money or funds owned or under the custody or control of a bank by means of *materially* false or fraudulent pretenses, representations or promises) as charge in the indictment;
>
> Second, that the defendant executed or attempted to execute the scheme with the intent to defraud the bank; and
>
> Third, that at the time of the execution of the scheme, the bank had its deposits insured by the Federal Deposit Insurance Corporation.

2 L. Sand, et al., Modern Federal Jury Instructions 44-9 (2004) (emphasis added).

However, the second element refers directly to the "scheme"

defined in the first element; as such, the second element implicitly incorporates the requirement of materiality. The case law makes this clear, holding that not only the scheme but also its execution must involve material statements. See, e.g., Neder, 527 U.S. at 20 (holding that the federal fraud statutes require that "a scheme to defraud *employ* material falsehoods") (emphasis added); Cooper, 283 F. Supp. 2d at 1232 (holding that under Section 1347, "the government must prove that the defendants knowingly and willfully *executed or attempted to execute a scheme* to defraud . . . *by means of material, fraudulent representations*.") (emphasis added). Indeed, if a fraudulent scheme is defined as one based on materially false representations, it would be illogical to argue that an individual could execute or attempt to execute such a scheme by making immaterial statements.

For this reason, even if the government can establish that Dr. Chase engaged in an overarching scheme to defraud benefit programs, it cannot obtain a conviction on any individual Section 1347 count unless it provides evidence sufficient to establish the materiality of the statements alleged in that particular count.

Because, as discussed above, the government has not demonstrated the materiality of the statements alleged in any of the non-surgical counts, Dr. Chase is entitled to a judgment of

acquittal on all such counts.

2. Sufficiency of the evidence regarding attempted or actual execution of a scheme to defraud under 18 U.S.C. § 1347

Dr. Chase argues that he is entitled to a judgment of acquittal on all of the non-surgical counts that charge violations of 18 U.S.C. § 1347. He argues that because he never performed surgery or submitted reimbursement claims on the non-surgical patients, his actions fell short of the conduct required for an execution or attempted execution of a fraudulent scheme under Section 1347. As discussed below, even if Dr. Chase were not entitled to a judgment of acquittal on the non-surgical counts because of the government's failure to establish materiality, he would be entitled to judgment on this ground.

Section 1347 "punishes executions or attempted executions of schemes to defraud, and not simply acts in furtherance of the scheme." United States v. Hickman, 331 F.3d 439, 446 (5th Cir. 2003). While conceding that Dr. Chase did not actually execute a scheme to defraud with respect to the non-surgical patients, the government argues that he attempted to execute such a scheme by recording false statements in the non-surgical patients' charts and recommending that they undergo surgery that was not medically necessary.

To obtain a conviction for an attempted crime, "the government must prove that the defendant had the intent to commit the crime and engaged in conduct amounting to a substantial step

towards the commission of the crime." United States v. Yousef, 327 F.3d 56, 134 (2d Cir. 2003).[4] A substantial step must be something more than "mere preparation," but it need not be the "last act necessary for the actual commission of the substantive crime." Id. The inquiry "focuses on the point when the accused's conduct has progressed sufficiently to minimize the risk of an unfair conviction." United States v. Manley, 632 F.2d 978, 988 (2d Cir. 1980). "[T]he finder of fact may give weight to that which has already been done as well as that which remains to be accomplished before commission of the substantive crime." Id. at 987.

The government contends that it has introduced evidence that would permit a jury to conclude that Dr. Chase recorded false statements in the non-surgical patients' medical charts with the intent of performing medically unnecessary cataract surgery and fraudulently billing benefit programs for that surgery. It argues that in recording those statements, Dr. Chase took substantial steps toward the execution of a scheme that was thwarted only by the patients' refusal to undergo surgery.

Even assuming that the statements recorded by Dr. Chase were

[4] Dr. Chase argues that traditional case law regarding attempt is inapplicable to the fraud context, suggesting instead that the standard for identifying the commission of attempted fraud is whether the victim has been exposed to a risk of loss. However, because Dr. Chase prevails even under the standard articulated by the government, it is unnecessary to consider the applicability of Dr. Chase's proposed standard.

false and that he recorded them with the intent of committing fraud at some point in the future, the Court cannot accept the government's contention that this behavior represented a substantial step toward the execution of a fraudulent scheme. In order for any such scheme to come to fruition, Dr. Chase would have needed to persuade a patient to undergo surgery, perform the surgery, sign a certification that the surgery was medically necessary, submit a claim for reimbursement, obtain approval of the claim by the benefit program, and receive payment. None of these steps was ever taken with respect to any of the non-surgical patients. In fact, the evidence demonstrated that following Dr. Chase's recommendation of surgery, each patient would undergo a lengthy informed consent procedure with a nurse who would explain in detail the benefits and risks of the surgery. The patient would then take additional documents home and consider the matter before making a decision to go forward. The frequency with which patients refused to undergo surgery underscores the preliminary nature of Dr. Chase's recommendations.

The fact that Dr. Chase's conduct in the cases of the non-surgical patients terminated at such an early stage of the process and was so far removed from the point where the alleged victims faced a risk of loss weighs heavily against a finding that he engaged in an attempt. In short, the conduct alleged in

the non-surgical counts fell so far short of a completed execution of the alleged scheme that no rational jury could find that it represented a substantial step. A conviction based solely on that conduct would raise serious doubts as to whether Dr. Chase's actions had "progressed sufficiently to minimize the risk of an unfair conviction."

This Court is unaware of any case law that would support the government's expansive reading of the attempt doctrine in the fraud context. The case that comes closest is easily distinguishable. In United States v. Hanna, No. S1 94 CR. 116, 1995 WL 66616 (S.D.N.Y. Feb. 15, 1995), the defendant was convicted of attempted bank fraud for creating a counterfeit check and arranging to sell it to an undercover agent. Even though the check was never presented to the bank for payment, Hanna took all of the steps within his power to carry out the scheme; but for the fact that his contact was an agent, the fraud would have been complete. The court held that Hanna had taken the requisite substantial steps and was guilty of attempt. Hanna, 1995 WL at *1. In this case, by contrast, the steps that Dr. Chase took in furtherance of his alleged fraudulent scheme in the non-surgical cases were minimal compared to the many significant actions that remained for him to complete.

Accordingly, because no rational jury could find that the actions alleged in the non-surgical Section 1347 counts rose to

the level of an attempt to execute a fraudulent scheme, Dr. Chase is entitled to a judgment of acquittal on all such counts.

C. Sufficiency of the evidence regarding benefit programs' reimbursement standards

The government's case is premised on the notion that Dr. Chase engaged in a scheme to obtain payment for procedures that did not meet the reimbursement standards of the benefit programs in question. Dr. Chase argues, however, that the government has failed to present evidence explaining the reimbursement standards of any benefit program other than Medicare. He also argues that to the extent that the government has identified standards, it has now changed its theory of what those standards are, which amounts to an impermissible constructive amendment of the Indictment.

1. Whether the government has introduced sufficient evidence of private insurers' reimbursement standards

Dr. Chase contends that the government has failed to present evidence explaining the reimbursement standards of any benefit program other than Medicare. Accordingly, he argues, for all counts involving patients covered by private insurers, there is no evidence that his alleged false statements would be capable of influencing the insurers' reimbursement decisions, and hence none of the statements can be considered to satisfy the requirement of materiality under Sections 1035 and 1347.

The government has introduced into evidence insurance

contracts and other documents establishing that each of the benefit programs involved in this case pays only for services that are medically necessary. See, e.g., Gov't Ex. 9E (contract providing that Blue Cross and Blue Shield of Vermont will pay only for "medically necessary health services"); Gov't Ex. 9A (providing that Medicare and Medicaid will pay only claims that are "medically indicated and necessary"). Various doctors and employees also testified that insurance companies would not pay claims for procedures that were not medically necessary. From this evidence, a jury could conclude that each benefit program applies a standard of medical necessity in determining whether to pay claims.

Dr. Chase argues, however, that without any information as to how each program defines medical necessity, there is no basis for determining whether the specific false statements he is alleged to have made would be capable of influencing a program's determination that surgery was necessary in a given case.

The government's response is that there is a single concept of medical necessity in the ophthalmological community, and that the standard does not vary from benefit program to benefit program. There is at least some evidence to support this theory. The American Academy of Ophthalmology Preferred Practice Pattern sets forth guidelines for determining medical necessity without making reference to varying benefit program standards. See Am.

Acad. of Ophthalmology Preferred Practice Pattern, Cataract in the Adult Eye at 15 (2001) (stating that the "primary indication for surgery is visual function that no longer meets the patient's needs and for which cataract surgery provides a reasonable likelihood of improvement"). The ophthalmologists who testified treated the issue of medical necessity as a simple "yes/no" question, and they gave no indication that the necessity of a procedure would vary depending on the benefit program from whom payment is sought. There was also ample testimony that various factors, including visual acuity test results, severity or "density" of cataracts, and patients' visual complaints and desire to have surgery, are all important factors in determining medical necessity, even if no one factor defines a minimum threshold.

Dr. Chase argues that the government's witnesses were unable to agree on a single articulation of the "community" standard of medical necessity. For example, Dr. Rosenberg testified that surgery would never be medically necessary for a patient whose vision measured 20/20 on the traditional Snellen letter chart, while Dr. Tabin testified that it would be necessary on such a patient if there were sufficient cataract-induced vision loss. By itself, however, this lack of unanimity does not compel a conclusion that different benefit programs use different standards. There is sufficient evidence to permit the government

to present to the jury its theory that benefit programs judge medical necessity according to a community standard, and to propose its conception of what that standard is. While the disagreement among different witnesses may undermine the government's attempt to define the standard and demonstrate that Dr. Chase violated it, that is a battle that must be fought before the jury.

Accordingly, because there is evidence that could support a jury finding that the alleged false statements were capable of influencing private insurers' reimbursement decisions, Dr. Chase is not entitled to a judgment of acquittal on this issue.

2. Whether the government has engaged in constructive amendment of the Indictment by changing its theory of the standard for medical necessity

Dr. Chase argues in his reply memorandum that although the Indictment articulated a certain standard for determining the medical necessity of cataract surgery, the government has now abandoned that standard and is attempting to hold Dr. Chase to a different standard that is more consistent with evidence introduced at trial. He notes that the Indictment alleged that "[w]ith limited exceptions, standard medical practice does not support the need for cataract surgery unless a patient's corrected vision is 20/40 or worse." Indictment ¶ 36. This standard varies, he argues, from the "community standard" that the government now espouses.

While the Indictment does contain the quoted language referring to a 20/40 vision standard, Dr. Chase is incorrect that the Indictment's theory of medical necessity relies solely on that standard. To the contrary, the Indictment contains numerous paragraphs that identify other factors relevant to the question whether cataract surgery is medically necessary. The Indictment alleges that Dr. Chase described cataracts as "dense" when they were not dense. Indictment ¶ 23. It alleges that he exaggerated patient complaints about their vision and that he misrepresented patients' desire to have cataract surgery. Id. ¶¶ 25, 32. It alleges that he told patients they needed surgery when they had no significant visual loss and no significant difficulty with their daily activities. Id. ¶ 31. It alleges that he diagnosed "dense" cataracts and performed surgery on patients with "normal," or 20/20, vision. Id. ¶¶ 31, 36. It can easily be inferred from these allegations that the factors mentioned are relevant to the medical necessity of cataract surgery. Many of these same factors were mentioned by the government's witnesses as bearing on the necessity of surgery: the severity of a patient's cataracts, the patient's desire to have surgery, the impact on a patient's vision and daily activities, and the patient's visual acuity. Accordingly, the government's reliance on a "community standard" that considers the same factors as those listed in the Indictment does not represent a shift in its

theory.

It may be true that the government has backed away from its original allegation that nearly all surgeries on patients with vision better than 20/40 are not medically necessary. The government need not prove every allegation in the Indictment, however, as long as it can prove each element of the offense by means of other allegations in the Indictment. As noted above, a constructive amendment of the Indictment occurs when "the proof at trial [has] so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." Salmonese, 352 F.3d at 620. Constructive amendment must be distinguished, however, from "constructive narrowing," where the government simply fails to prove one of many allegations in the indictment. See, e.g., United States v. Wallace, 59 F.3d 333, 337 (2d Cir. 1995) (upholding a conviction where the indictment alleged deposit and receipt of fraudulent checks, but the government proved only receipt). This is a case of constructive narrowing: because the Indictment identifies other factors upon which the government still relies in establishing the standard for medical necessity, it cannot be said that an essential element of the charge has been altered.

Accordingly, since the government's theory regarding the standard for medical necessity has not brought about a

constructive amendment of the Indictment, Dr. Chase is not entitled to a judgment of acquittal on that ground.

D. Whether the government has introduced sufficient evidence of materiality with regard to counts premised on recording certain types of statements in patient charts

The Indictment alleges that as part of his scheme to mislead benefit programs, Dr. Chase recorded that certain patients had "dense" cataracts even though he knew that their cataracts were not "dense." It also alleges that in certain patients' charts, he recorded visual acuity scores that did not reflect the patients' actual vision. Dr. Chase argues that the government has failed to present evidence that these types of notations would be material to any benefit program's reimbursement decisions. In particular, he asserts, there is no evidence that benefit programs consider whether a cataract is "dense" in determining whether or not a reimbursement claim is valid, nor is there evidence that they consider whether a chart contains particular Snellen or contrast sensitivity testing/Brightness Acuity Tester ("CST/BAT") scores.

Dr. Chase's contentions are not borne out by the evidence. As noted above, the government has presented evidence that benefit programs will only pay for procedures that are medically necessary, as defined by the general standards of the ophthalmological community. Dr. Chase argues that there is no evidence that any benefit program requires cataracts to be of a

certain grade or vision test results to be below a certain level before surgery can be deemed necessary. Testimony at trial suggested, however, that doctors take a variety of factors into account in determining whether cataract surgery is medically necessary. The lack of a clear threshold and the fact that a single factor is not determinative do not mean that a particular factor is not relevant to the question of medical necessity.

Indeed, numerous witnesses testified that the severity, or "density," of a cataract bears on the necessity of surgery. There was testimony that virtually all individuals over a certain age have cataracts, but that removal is necessary only when a patient's cataracts become sufficiently severe to interfere with his or her vision. There was also ample testimony, not only from other doctors but from Dr. Chase's own employees and office documents, that a patient's vision test results, either Snellen, CST, or both, are relevant factors in determining the necessity of surgery. Various doctors testified, for example, that it would be very unusual for surgery to be necessary on a patient with 20/20 Snellen vision.

In light of this evidence, a jury could rationally conclude that Dr. Chase's alleged false notations concerning density of cataracts and vision scores were material to the reimbursement determinations of the benefit programs in this case. Dr. Chase is not entitled to a judgment of acquittal on that ground.

E. Whether Dr. Chase is entitled to a judgment of acquittal on the ground that certain statements are not misleading when the charts are considered in their totality

Among the allegations listed in the Indictment are that Dr. Chase recorded in certain patients' charts that the patients wanted cataract surgery when in fact they did not. During the government's case in chief, various patients testified that they had not told Dr. Chase that they wanted cataract surgery, even though there were notations in Dr. Chase's handwriting in their charts stating that they did want surgery.

Dr. Chase contends, however, that his notations cannot be viewed in isolation, and that some of the charts in question contain notes elsewhere by nurses, technicians, or Dr. Chase himself that accurately record the patients' decision to postpone or forego surgery. He argues that when the charts are viewed in their totality, there is no evidence that the notations alleged in the Indictment were misleading. Accordingly, he argues, he is entitled to a judgment of acquittal on all counts to the extent that they are based on the notations in question.

Dr. Chase makes a similar argument with regard to the allegations in the Indictment that he recorded CST/BAT results in location designed to mislead the viewer into thinking they were Snellen test results. He notes that he presented evidence during the cross-examination of witness Vicky Oakes to establish that every medical chart implicated in the Indictment contains a Snellen score.

He also notes that the government was able to determine the patients' Snellen visions through its own review of the charts. For this reason, he argues, the vision scores on the charts are not misleading in their totality, and no reasonable juror could conclude that his recording of the CST results would be misleading to an insurance company auditor.

While Dr. Chase's arguments might carry some weight with a jury, they do not entitle him to a judgment of acquittal. The government has introduced into evidence various charts containing notations by Dr. Chase that the patients wanted surgery, and it has presented testimony from those patients denying that they told that to Dr. Chase. Similarly, it has presented evidence that Dr. Chase wrote CST/BAT results in certain places on the charts without noting that they were CST/BAT results, and it has presented testimony from doctors and employees who stated that this practice was misleading because those locations were usually reserved for Snellen results. From that evidence, a rational jury could conclude that Dr. Chase made false statements. Dr. Chase's contention that other information in the charts would clear up the confusion or mitigate the falsity of those statements is a conclusion that a jury would be free to accept or reject, but it is not the Court's role to weigh and compare the evidence in this manner. Accordingly, Dr. Chase is not entitled to a judgment of acquittal on this ground.

F. Whether the government has presented sufficient evidence that the procedures performed on the surgical patients were not medically

necessary

The Indictment alleges that Dr. Chase performed cataract surgery on the nine surgical patients even though it was not medically necessary. Dr. Chase argues, however, that the government has presented insufficient evidence that the surgeries were not medically necessary. He contends that because the question of medical necessity requires knowledge outside the ken of the average juror, the government was required to present expert testimony on that issue.

The Court agrees that expert testimony is helpful, and perhaps even essential, to assist the jury in understanding whether a procedure is medically necessary. See United States v. Syme, 276 F.3d 131, 136 (3d Cir. 2002) (holding, in a prosecution for false statements under Section 1035, that whether an ambulance trip was medically necessary was "an issue on which the average juror could benefit from a physician's expert testimony").

However, the government has provided ample expert testimony from which a jury could determine the medical necessity of the various surgeries in this case. Numerous doctors testified regarding the different factors that bear on whether surgery is medically necessary, such as the patient's desire for surgery, his or her vision test scores, the severity or "density" of the cataracts, and the degree to which the patient's vision and daily activities were impaired. There was also testimony regarding the

contraindications to surgery, as well as evidence that dense central nuclear cataracts typically develop in both eyes at the same time.

Having established this background, the government introduced testimony from patients regarding their vision and their subjective complaints, testimony from doctors regarding the patients' physical symptoms and vision test results, and documents from Dr. Chase's records. It presented various experts' opinions, based on their examinations of the nine surgical patients and their records, that the patients had undergone cataract surgery that was not medically necessary. While the jury is free to accept or reject these opinions, there is sufficient evidence from which it could infer that surgery was not medically necessary for a given patient. Accordingly, Dr. Chase is not entitled to a judgment of acquittal on this ground.

G. Sufficiency of the evidence regarding false statements in individual patient charts

Dr. Chase argues that the government has provided insufficient evidence to establish that the statements he made in certain patient charts were false. However, in large part, his arguments are based not on a lack of evidence in support of the government's allegations, but on the presence of other evidence which, in his view, casts doubt on the allegations. Because the weighing of conflicting evidence is the province of the jury, the Court will consider only whether there is sufficient evidence to support a jury finding in favor of the government's allegations.

1. Sufficiency of the evidence supporting Counts 1 and 2 (patient Judith Salatino

Dr. Chase argues that the government has introduced insufficient evidence to support the allegations in Counts 1 and 2 that he falsely recorded that patient Judith Salatino was not able to drive at night due to glare. See Indictment ¶¶ 51, 53. However, at trial, Ms. Salatino testified that she was in fact able to drive safely at night, and that she never told Dr. Chase that she was unable to drive safely at night. Based on this evidence, a jury could find that the statement made by Dr. Chase was false.

2. Sufficiency of the evidence supporting Counts 3 and 4 (patient Susan Lang

Dr. Chase argues that the government has introduced insufficient evidence to support the allegations in Counts 3 and 4 that he falsely recorded in June 2003 that patient Susan Lang had trouble driving safely due to glare. See Indictment ¶¶ 55, 57. However, at trial, Ms. Lang testified that she did not have trouble driving at night during the time in question, and she denied telling Dr. Chase that she could not see safely to drive at night. Based on this evidence, a jury could find that the statement made by Dr. Chase was false.

3. Sufficiency of the evidence supporting Counts 5 and 7 (patient Margaret McGowan

Dr. Chase argues that the government has introduced insufficient evidence to support the allegations in Counts 5 and 7 that he falsely recorded in August 2001 that patient Margaret

McGowan could not see to drive safely at night. See Indictment ¶¶ 59, 63. However, Ms. McGowan testified that she had been doing significant driving at night and that she was not experiencing difficulty. She also testified that she had not told Dr. Chase that she was having trouble driving at night. Based on this evidence, a jury could find that the statement made by Dr. Chase was false.

4. Sufficiency of the evidence supporting Counts 24 and 26 (patient Mary Lynch)

Dr. Chase argues that the government has provided no evidence to support certain allegations in Counts 24 and 26 of the Indictment. The challenged allegations are that Dr. Chase falsely recorded on June 14, 2001 that patient Mary Lynch's vision in her left eye was "20/40+1" and that she had a "dense" central capsular opacity in her left eye, and that he recommended and performed a YAG laser procedure on Ms. Lynch that was not medically necessary.

The government presented evidence that Ms. Lynch's Snellen vision was 20/20, but that Dr. Chase wrote "20/40"[5] in the space on her chart marked "1. Vision." Various witnesses testified that that space was customarily reserved for Snellen scores, and that the recording of a CST/BAT score there would be misleading. Various

[5] The Indictment alleges that Ms. Lynch's chart reads "20/40+1," but the chart actually reads "20/40." Because the difference between the two scores is not substantial and because the Indictment actually understates the discrepancy between the reported vision and Ms. Lynch's Snellen vision, the minor inconsistency between the allegation in the Indictment and the actual chart is not material.

experts also testified that in their opinion, a diagnosis of a "dense" cataract was not consistent with a Snellen vision of 20/20. Based on this evidence, a jury could conclude that Dr. Chase's statements about Ms. Lynch's vision were false.

The government also presented testimony that YAG procedures are rarely, if ever, appropriate within two months of surgery and that secondary cataract surgery is not medically necessary for a patient whose Snellen vision is 20/20. Based on this evidence, a jury could conclude that a YAG procedure was not medically necessary for Ms. Lynch, who had the procedure only 31 days after cataract surgery, and whose Snellen vision was 20/20.

5. Sufficiency of the evidence supporting Counts 34-35, 38-39, 48-49, 58-59, and 68-69 (patients Robert McClain, Jacqueline Murphy, Darlene Ashley, Sally Lindberg, and Hubert Pfingst)

Dr. Chase argues that the government has introduced insufficient evidence to support the allegations in Counts 34-35, 38-39, 48-49, 58-59, and 68-69. However, the Court has already determined that Dr. Chase is already to a judgment of acquittal on these and the other non-surgical counts. Accordingly, it is unnecessary to consider his arguments on these counts that relate to specific patients.

H. Whether to reserve decision

The government argues that even if the Court determines that Dr. Chase is entitled to a judgment of acquittal on certain counts, the Court should reserve decision under Fed. R. Crim. P. 29(b). As

noted above, Rule 29(b) "permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in proceeding to a verdict thereby preserving its right to appeal[.]" Fed. R. Crim. P. 29 Advisory C'ttee Note to 1994 Amendments.

In this case, Dr. Chase's interest in an immediate resolution is substantial. Because he is entitled to a judgment of acquittal on some, but not all, of the counts in the Indictment, the jury's verdict on the surgical counts might well be influenced by the presence of the improper counts. For this reason, Dr. Chase would be severely prejudiced by the Court's failure to dismiss the improper counts before the case is submitted to the jury.

By contrast, the government would not be prejudiced by an immediate dismissal of the improper counts. If the Court were to reserve decision, the government's right to appeal would be preserved, but it would gain little as a result. If the jury were to find Dr. Chase not guilty on the surgical counts, the facts of this case suggest that there would be a vanishingly small possibility that the jury would find him guilty on the non-surgical counts, so in all likelihood no appeal would be available. If, on the other hand, the jury found Dr. Chase guilty on all counts and the Court subsequently issued a judgment of acquittal on the non-surgical counts, there would be little need for an appeal. Because the United States Sentencing Guidelines may permit the Court to

consider Dr. Chase's actions with regard to the non-surgical patients as relevant conduct for sentencing purposes, Dr. Chase's sentence would be unlikely to be affected by a judgment of acquittal on the non-surgical counts.

Because Dr. Chase's interest in an immediate decision strongly outweighs the government's interest in a reservation of the Court's decision, the Court declines to reserve decision under Rule 29(b).

CONCLUSION

For the foregoing reasons, Dr. Chase's motion for acquittal is GRANTED with respect to Counts 14-17, 21-22, and 30-69, and DENIED with respect to all other counts.

Dated at Burlington, Vermont this 21st day of November, 2005.

/s/ William K. Sessions III
William K. Sessions III
Chief Judge